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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF NYSE GROUP, INC. IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF CREDIT SUISSE FIRST BOSTON LTD., *ET AL.*'S PETITION FOR A WRIT OF *CERTIORARI*

NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") hereby respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file the attached brief as *amicus curiae* in this case in support of the Petition for a writ of *certiorari*. The consent of counsel for Petitioners Credit Suisse First Boston Ltd., *et al.*, has been obtained.[1] The consent of counsel for Respondents Glen Billing, *et al.*, was requested but not obtained.

The NYSE Group operates two securities exchanges, the NYSE and NYSE Arca. The NYSE is the world's largest and most liquid cash equities market, listing over 2,684 companies with a total market capitalization of over $22.5 trillion. NYSE Arca is an all-electronic stock exchange. The NYSE Group also performs regulatory responsibilities relating to these exchanges and their participants.

New York Stock Exchange LLC and NYSE Arca, Inc. are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open market . . . and, in general,

1. The written consent is being filed with the Clerk of the Court contemporaneously herewith.

to protect investors and the public interest." 15 U.S.C. §78f(b)(5).

The NYSE Group's performance of its regulatory and general oversight functions are protected by the doctrine of absolute immunity. See, *e.g.*, *D'Alessio* v. *New York Stock Exchange, Inc.*, 258 F.3d 93, 106 (CA2 2001) ("[W]hen acting in its capacity as a SRO, [the NYSE Group] is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder."). In addition, with regard to the doctrine of implied immunity, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing* v. *Credit Suisse First Boston, Ltd*, 426 F.3d 130, 171 (CA2 2005). Nevertheless, the decision of the Second Circuit is of serious concern to the NYSE Group in a way that reaches well beyond the result of this particular case.

In the Circuit that is home to much of the nation's securities industry, the decision announces a standard for implied antitrust immunity in that industry that is vague and indeterminate, and explicitly disregards the scope of the SEC's authority. As a result, market participants will be unable reasonably to predict whether potential courses of conduct may subject them to antitrust claims for treble damages and joint and several liability, and therefore are likely to refrain from engaging in collaborative efforts necessary to make the securities industry operate efficiently. See *Verizon Communications Inc.* v. *Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004) (expressing concern of over-deterrence if antitrust intervention is allowed in the context of a regulatory regime); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963) (antitrust immunity is proper where necessary "to make the [Exchange Act] work").

The NYSE Group's interest is in the immediate articulation by the Court of a clear implied immunity standard that supports the authority of securities industry regulators and allows Congress' regulatory scheme to work as intended. Accordingly, NYSE Group, Inc. respectfully moves the Court to grant it leave to file the attached brief as *amicus curiae* in support of the Petition for a writ of *certiorari* to the Second Circuit.

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NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") respectfully submits this brief as *amicus curiae* in support of the Petition for a writ of *certiorari*.[1]

INTEREST OF AMICUS CURIAE

The NYSE Group operates two securities exchanges, the NYSE and NYSE Arca (an all-electronic stock exchange). The NYSE is the world's largest and most liquid cash equities market, listing over 2,684 companies with a total market capitalization of over $22.5 trillion. For over 200 years, this exchange has provided a reliable, orderly, liquid, and efficient marketplace for investors and traders to buy and sell listed securities. The NYSE Group also performs regulatory responsibilities relating to these exchanges and their participants.

The New York Stock Exchange LLC and NYSE Arca, Inc. are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open

1. Petitioners have consented to NYSE Group, Inc.'s participation as *amicus curiae*, and a letter of consent is being filed concurrently with the Clerk of the Court. The consent of Respondents has been requested but not obtained. No counsel for any of the parties authored this brief, in whole or in part, and no one other than *amicus* made a monetary contribution to its preparation or submission.

market . . . and, in general, to protect investors and the public interest." 15 U.S.C. §78f(b)(5).

The NYSE Group's performance of its regulatory and general oversight functions is protected by the doctrine of absolute immunity. See, *e.g.*, *D'Alessio* v. *New York Stock Exchange, Inc.*, 258 F.3d 93, 106 (CA2 2001) ("[W]hen acting in its capacity as a SRO, [the NYSE Group] is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder."). In addition, with regard to implied immunity, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing* v. *Credit Suisse First Boston, Ltd.*, 426 F.3d 130, 171 (CA2 2005). Despite this special status, the NYSE Group has a vital interest in the immediate articulation by the Court of a test for implied antitrust immunity in this industry that allows participants in the securities markets ("market participants") reasonably to predict whether the antitrust laws will apply to particular activities, and supports the Exchange Act regulatory scheme.

SUMMARY OF ARGUMENT

Amicus curiae NYSE Group, Inc. respectfully submits that the Court should give its immediate attention to stating the proper standard for implied immunity[2] from the antitrust laws in the context of the federal regulatory scheme that governs the securities industry.

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2. "Implied immunity" is also known as "implied repeal" or "implied revocation." *See Friedman* v. *Solomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (CA2 2002).

First, if let stand, the Court of Appeals' decision would impair the efficient operation of the nation's securities industry. The indeterminate balancing test announced by the Second Circuit, *Billing*, 426 F.3d, at 164-165, deprives market participants of the ability reasonably to predict whether the antitrust laws will apply to potential courses of conduct. Given the potential for treble damages and joint and several liability in antitrust conspiracy cases involving billions of dollars of commerce, the resulting uncertainty is likely to cause market participants to refrain from engaging in collaborative efforts necessary to make the regulatory system work as intended by Congress, and thus to make the industry operate most efficiently. Because the securities industry is so central to the health of the overall economy yet is "as sensitive as a hair trigger," H.R. Rep. No. 73-1383, p. 4 (1934), and because the Second Circuit decision would, as a practical matter, affect the conduct of market participants nationwide, the Court should intervene now to articulate the proper standard for implying antitrust immunity in this industry.

Second, the Second Circuit's approach to determining the existence of implied antitrust immunity conflicts with the precedents of the Court.

a. Under the approach of the Court of Appeals, whether immunity will be implied under the "specific potential conflict" branch of the doctrine turns on an undefined balancing of an unlimited array of factors, without regard to whether the SEC has the authority to regulate, and has actively regulated, the conduct at issue. In contrast, to allow the federal scheme of securities regulation to operate as Congress intended, the Court has held the antitrust laws inapplicable to conduct the SEC has actively regulated.

See *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689-690 (1975) (implying immunity as to antitrust claims alleging the fixing of commission rates where the SEC had the authority to address, and had addressed, such conduct, even though, at the time of the decision, it prohibited such behavior); cf. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-358 (1963) (finding no implied immunity because the SEC lacked the authority to review the SRO action at issue).

In trying to minimize the impact of its decision, the Court of Appeals concedes that conduct in the securities industry cannot be judged under the typical antitrust paradigm, and suggests that antitrust analysis in this industry may take account of regulatory considerations other than competition. *Billing*, 426 F.3d, at 165-166. While it thus acknowledges the applicability of the broader, Exchange Act balancing (which weighs an array of regulatory factors in addition to competition), the Court of Appeals' approach contravenes Congressional intent — as recognized in the decisions of the Court — that such evaluation be performed by the SEC, with its industry experience and expertise, and without interference from the possibility that an antitrust court will reach a conflicting judgment. See *United States* v. *Nat'l Assn. of Securities Dealers, Inc.*, 422 U.S. 694, 735 (1975) ("[W]e have implied immunity in particular and discrete instances to ensure that the federal agency entrusted with regulation in the public interest could carry out its responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.").

b. The decision below also conflicts with precedent of the Court with respect to the availability of the "pervasive

regulation" basis for implied immunity. While the Court of Appeals would allow market participants such immunity only where somehow "derivative" of implied immunity found to exist with respect to an SRO, the Court in *National Association of Securities Dealers* provided a much broader basis, making this doctrine available when necessary to protect defendants — whether regulator or regulated — from being "subjected to duplicative and inconsistent standards." *Ibid.*

ARGUMENT

I. Articulation by the Court of a Standard for Implying Antitrust Immunity in the Securities Industry That Is Clear to Market Participants and Supports Congress' Regulatory Scheme Is a Matter of Immediate National Importance

A. The Exchange Act Embodies a Unique Scheme Designed to Regulate an Industry That Is Both "Sensitive as a Hair Trigger" and Central to the Nation's Economy

"[E]ach of the Supreme Court's [implied immunity] cases is decisively shaped by considerations of the special aspects of the regulated industry involved." *Phonetele, Inc.* v. *Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (CA9 1981) (Kennedy, J.). For the securities industry, Congress created "a unique pattern of regulation combining both industry and government responsibility." H.R. Rep. No. 94-123, p. 48 (1975). It adopted this regulatory structure in the early 1930s, in the wake of the 1929 Wall Street crash and the ensuing Great Depression, S. Rep. No. 73-792, p. 3 (1934), and in recognition that "security markets . . . are as sensitive as a

hair trigger," and affect "the economic machinery of the whole country. . . ." H.R. Rep. No. 73-1383, p. 4 (1934).

A unique aspect of the Exchange Act is its tiered approach to regulation, which delegates authority to SROs to act as the front line of enforcing compliance with "legal and ethical standards," with the SEC overseeing the activities of the SROs. *See* H.R. Rep. No. 94-123, p. 48 (1975). As Justice Douglas stated when he was SEC Chairman, Congress intended to allow the SROs to "take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope that it would never have to be used." W. Douglas, Democracy and Finance, 82 (Allen ed. 1940), quoted in *Silver*, 373 U.S., at 352.

Another hallmark of the Exchange Act is the flexibility it provides regulators to apply their expertise to this sensitive, highly-nuanced and ever-changing industry. Congress did not design the Exchange Act as a comprehensive list of statutory prohibitions or mandates, but instead granted the SEC regulatory discretion sufficient to avoid both "unworkable 'straight-jacket' regulation," on the one hand, and "loopholes which may be penetrated by slight variations in the method of doing business," on the other. S. Rep. No. 73-792, p. 5 (1934). The statute authorizes the SEC "to promulgate rules . . . which define permissible conduct of brokers and dealers and establish standards for trading in securities to insure the fairness and orderliness of the securities markets." H.R. Rep. No. 94-123, p. 48 (1975). For example, Section 9(a)(6) of the Exchange Act, 15 U.S.C. §78i(a)(6), forbids only stabilization of securities prices that is "in contravention of such rules and regulations as the Commission may prescribe

as necessary or appropriate in the public interest or for the protection of investors." See also 15 U.S.C. §78i(b) (prohibiting options transactions that are in breach of "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

In exercising its authority, the SEC is obliged to consider and weigh both competition and an array of other regulatory factors, such as protection of investors, prevention of fraudulent and manipulative acts and practices, and promotion of just and equitable principles of trade. See, *e.g.*, Section 19(f) of the Exchange Act, 15 U.S.C. §78s(f) (addressing "any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter"); Section 6(b)(5) of the Exchange Act, 15 U.S.C. §78f(b)(5) (requiring SROs to adopt rules that take account of these regulatory factors). In an ongoing, evolutionary process, the SEC evaluates those factors over time, as the industry and the SEC's analysis of the needs of the industry and its participants develop.[3] The antitrust laws, in contrast, provide a narrower framework and less flexibility, typically focusing on competition exclusively. See *Gordon*, 422 U.S., at 689 ("The sole aim of antitrust legislation is to protect competition. . . .").

3. See *Gordon*, 422 U.S., at 666, 675 (1975) (SEC once allowed SROs to fix "reasonable" commission rates, but at the time of the decision prohibited collective rate setting); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 139 (CA2 2003) (SEC had previously approved options allocation plan, but at the time of the lawsuit prohibited agreements for exclusive listing of options).

In addition, the antitrust laws often regard collaboration among competitors with suspicion.[4] Even though permissible in particular circumstances, such collaboration can become a target of lengthy antitrust litigation, with the potential for treble damages and joint and several liability with no statutory right of contribution,[5] and the attendant pressure to settle. However, in the securities industry, the very essence of which is the creation and maintenance of a marketplace where buyers and sellers interact, such collaboration among participants is essential, as acknowledged by the industry's self-regulatory structure. Section 6 of the Exchange Act, 15 U.S.C. §78f (contemplating collaboration among market participants to form national securities exchanges).[6] Moreover, to perform their roles effectively under the Exchange Act, SROs and the SEC may engage in conduct

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4. See, *e.g.*, *United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966) (holding §1 of the Sherman Act violated where "joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan" among competitors to refuse to deal with certain types of distributors); *United States* v. *Container Corp. of America*, 393 U.S. 333, 337 (1969) ("The inferences are irresistible that the exchange of price information [among competitors] has had an anticompetitive effect in the industry, chilling the vigor of price competition.").

5. See 15 U.S.C. §15(a) (providing for treble damages in federal antitrust cases); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640, 645 (1981) (stating that joint and several liability under the Sherman Act "simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants" and that "Congress neither expressly nor implicitly intended to create a right to contribution.").

6. See also Section 11A of the Exchange Act, 15 U.S.C. §78k-1; Section 15A of the Exchange Act, 15 U.S.C. §78o-3.

involving multiple market participants. For example, at one time commission rates were, with SEC approval, set by agreement among SROs and brokers. See *Gordon*, 422 U.S., at 662-667. Similarly, "the SEC [at one time] approved a plan, formulated by the exchanges jointly, for the single, or exclusive, listing of any new equity option." *Options*, 317 F.3d, at 140 (citing SEC Release No. 16863, 1980 SEC LEXIS 1378, at *1-*2 (May 30, 1980)); see also *Silver*, 373 U.S., at 360 ("The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act").

Securities industry collaboration continues today.[7] In the absence of a clear standard for implying antitrust immunity, however, the prospect of antitrust attack could deter necessary and beneficial conduct of this sort.

B. By Creating Unreasonable Uncertainty and Disregarding the Authority of the SEC, the Second Circuit's Vague Balancing Test Would Impair the Effectiveness of the Federal Scheme of Securities Regulation on a Nationwide Basis

The parties to this case generally agreed that "potential specific conflict" antitrust immunity applies "to whatever

7. See, *e.g.*, NYSE Info. Memo No. 05-80, 2005 NYSE Info. Memo LEXIS 80 (Oct. 13, 2005) (providing guidance on business continuity and contingency plans, and noting that "[b]usiness continuity planning decisions made by one institution may affect the safety and soundness of other institutions and, possibly, the very functioning of the financial markets . . . . because of the broad interdependence among industry participants") (citation omitted).

conduct the SEC could permit under its regulatory regime," *Billing*, 426 F.3d, at 167-169, but disagreed as to the application of that standard to this case. *Ibid.* In stark contrast, the Second Circuit held that it did not need to decide the scope of the SEC's authority over the conduct at issue to determine whether antitrust immunity applied. *Id.*, at 168 ("We need not resolve the bounds of SEC authority."). Instead, it propounded an "all the facts and circumstances" balancing test, informed by five criteria, including "any other evidence":

> "We will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal." *Id.*, at 164-165.

This standard deprives market participants of any ability reasonably to predict whether potential courses of conduct would subject them to antitrust scrutiny. Particularly given the trebling and joint and several nature of antitrust conspiracy damages, such uncertainty is likely to cause exactly the over-deterrence and regulatory disruption against which the Court warned in *Verizon Communications Inc.* v. *Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations [by an antitrust court intervening where a

regulatory regime is in place] 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

In particular, in an industry requiring collaboration among competitors, the lack of a clear standard for implied antitrust immunity is likely to deter market participants from engaging in beneficial collaborative efforts that support regulatory initiatives and make the industry more efficient. Moreover, because New York, and thus the Second Circuit, is home to much of the nation's securities industry, the Second Circuit's decision would, as a practical matter, detrimentally affect the conduct of securities market participants nationwide. Immediate clarification is warranted, especially since the issue (the applicable legal standard) is so starkly presented, the opportunities for review by the Court may be infrequent, and the stakes for the economy are so high. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, __ S. Ct. __, 2006 U.S. LEXIS 2497, **13 (March 21, 2006) ("[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

II. The Second Circuit's Approach Conflicts with the Court's Decisions, Which Promote the Integrity of the Congressionally-Mandated Securities Scheme

A. The Second Circuit's Test For a "Potential Specific Conflict" Is Contrary to the Court's Decisions in *Gordon*, *Silver* and *National Association of Securities Dealers*

The need for immediate review of this issue is magnified by the direct conflict between the Court of Appeals' approach and the Court's precedents. The Second Circuit held it did not need to decide the scope of SEC authority over the conduct at issue to determine whether the antitrust laws were impliedly repealed by the securities laws. *Billing*, 426 F.3d, at 168. In contrast, the Court's decisions focus on the questions of the existence and exercise of SEC authority that the Court of Appeals eschewed and the differing standards employed by the antitrust laws (typically limited to competitive effects) and the Exchange Act (considering competition plus other regulatory criteria).

In *Silver*, the Court declined to imply immunity because, prior to the 1975 amendments to the Exchange Act, the SEC lacked the authority to review the termination of a non-member's direct wire connections to members. *Silver*, 373 U.S., at 357-358. The Court twice noted that "a different case" would exist if such review (including review of competitive implications) were available. *Id.*, at 358 n.12, 360.[8] In *Gordon*, the Court held implied repeal

8. The 1975 Amendments to the Exchange Act conferred on the SEC extensive powers to review exchanges' conduct and the application of their rules, 15 U.S.C. §78s(d), and specifically included competition as one of the factors for the SEC to consider. 15 U.S.C. §78s(f).

appropriate where the SEC had, and had exercised, such power of review with regard to the fixing of commission rates, and imposition of the antitrust laws would "subject the exchanges and their members to conflicting standards." *Gordon*, 422 U.S., at 689-691. The Court reached this conclusion despite the fact that the SEC prohibited such conduct at the time of the Court's decision. *Id.*, at 690-91.

This conflict is not avoided by the Second Circuit's expression of willingness to consider a variety of regulatory factors in assessing the propriety of securities industry conduct under the antitrust laws. *Billing*, 426 F.3d, at 165-166. By proposing the availability of such a modified rule of reason analysis, the Court of Appeals recognized the inadequacy of the traditional, "competition-only" analysis typically applied under the antitrust laws in the context of the securities industry. *See id.*, at 165. However, the court disregarded an integral part of Congress's regulatory plan, by placing this Exchange Act-like evaluation in the hands of an antitrust court rather than the SROs and the SEC. The ability of SROs and the SEC to develop finely calibrated regulatory responses for this rapidly-changing industry would be impaired if the potential for massive antitrust judgments chilled the collaboration these expert regulators consider desirable. See *Nat'l Assn. of Securities Dealers, Inc.*, 422 U.S., at 734 (implied immunity necessary in order to "assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.").

B. The Second Circuit's Approach to the "Pervasive Regulation" Branch of Implied Immunity Conflicts with the Court's Decision in *National Association of Securities Dealers*

The Second Circuit's decision also conflicts with *National Association of Securities Dealers*, by allowing implied immunity on the ground of "pervasive regulation" to apply to market participants only where it would be somehow be "derivative" of immunity that applied to an SRO. *Billing*, 426 F.3d, at 160-161. The Court in *National Association of Securities Dealers* did not so restrict this ground for implied immunity. There, the government alleged that the National Association of Securities Dealers and certain mutual funds, underwriters and broker-dealers had agreed to restrict the sale and fix the prices of mutual fund shares, in violation of the Sherman Act. *Nat'l Assn. of Securities Dealers, Inc.*, 422 U.S., at 734-735. The Court acknowledged that conduct at issue was "neither required . . . nor authorized" under the securities laws. *Id.*, at 730. It nevertheless noted the "broad regulatory authority conferred upon the SEC" in the area, *id.*, at 734, and concluded that, in the context of the "pervasive regulatory scheme," implied repeal was applicable to all defendants, without distinguishing between SRO and market participants, because they otherwise could be subject to "duplicative and inconsistent standards" by the concurrent application of the antitrust and the securities laws, which was "hardly a result that Congress would have mandated." *Id.*, at 735.

The Second Circuit's decision conflicts with this standard — a conflict it cannot avoid by incorporating other regulatory factors, together with competition, into an antitrust analysis, but diverting their consideration away from the

industry regulators intended by Congress to apply and balance all of these factors.

CONCLUSION

NYSE Group, Inc. respectfully submits that the Court should grant the Petition for a writ of *certiorari*.

Respectfully submitted,

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